No. 15121.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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MATSUO YOSHIDA and CHISATO YOSHIDA,

*Appellants,*

*vs.*

LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

*Appellee.*

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## APPELLANTS' OPENING BRIEF.

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ARTHUR N. GREENBERG,
1200 C. C. Chapman Building,
756 South Broadway,
Los Angeles 14, California,
*Attorney for Appellants.*



Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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### Jurisdictional Statement.

This is an appeal from a judgment entered in favor of Appellee on January 9, 1956 by the United States District Court for the Southern District of California, Central Division. [Tr. pp. 73, 74.]

Motion for New Trial was filed with said District Court on January 19, 1956; and, after argument, was denied on February 7, 1956. [Tr. pp. 75-80.]

Notice of Appeal was filed on March 6, 1956. [Tr. p. 81.]

Jurisdiction was vested in said District Court by reason of the fact that Appellants were at all times citizens of Japan, and Appellee was at all times a corporation, incorporated under the laws of the State of Massachusetts. [Tr. pp. 21, 59, 118, 162.]

The basis of jurisdiction of said District Court was diversity of citizenship. Diversity exists where a citizen of a foreign nation brings suit against a corporation, incorporated in a State other than that in which the District Court sits.

Constitution of the United States, Art. III, Sec. 2;
*Lumbermen's Mutual Casualty Co. v. Elbert,* 348 U. S. 48 (1954);
*Uribe v. Hartford Accident & Indemnity Co.,* 3 Fed. Supp. 672 (Idaho, 1933);
28 U. S. C. A., Sec. 1232.

An appeal from final judgment of the District Court to the Court of Appeals is authorized by the provisions of 28 U. S. C. A., Sec. 1291.

## Nature of the Action.

Appellants brought this action against Appellee to recover on an insurance policy issued by Appellee in favor of Sylvester M. Gonzales, hereinafter referred to as Gonzales. Prior to commencement of this action, Appellants recovered judgment for personal injuries against Gonzales in the Superior Court of Los Angeles County, California.

This action is against Gonzales' insuror. When judgment is entered against an insured in an action for personal injuries, the judgment creditor may sue the insuror on the policy to recover the amount of the judgment.

*Cal. Ins. Code,* Sec. 11580(b)(2).

Moreover, Appellee's insurance policy provided that any person who secures judgment against the insured shall be entitled to recover under the policy to the extent

of insurance afforded thereunder. Plaintiff's Exhibit 8. [Tr. p. 121.]

The liability of an insuror in favor of the policyholder's judgment creditor is for the full amount of the policy, plus interest and costs.

*Pigg v. International Indemnity Co.,* 86 Cal. App. 671, 675, 261 Pac. 486 (1927).

## Statement of the Case.

### A. The Superior Court Action.

Appellants are husband and wife. On April 15, 1953, Appellant Chisato Yoshida suffered personal injuries as a result of the negligent operation of an automobile driven by Gonzales. An action was commenced and tried in the Superior Court of the State of California, in and for the County of Los Angeles. Judgment was entered against Gonzales, in favor of Appellant Chisato Yoshida in the amount of $25,540.00, for general damages, for loss of earnings and for future medical expense; and, in favor of Appellant Matsuo Yoshida in the amount of $4,632.45, for loss of services and for medical, surgical and ambulance expense incurred on behalf of his wife. In addition, costs in the amount of $37.55 were taxed against Gonzales.

On June 19, 1954, the judgment against Gonzales became final. Plaintiff's Exhibits 1 and 2. [Tr. pp. 9, 119.]

No part of said judgment has been paid by Gonzales or by Appellee. [Tr. pp. 9, 163.]

At the date of the accident, Gonzales was insured under an automobile liability policy issued by Appellee. Appellee has denied liability under said insurance policy for any part of said judgment.

**B. The Application for Insurance, the Investigation.**

In early April, 1952, Gonzales went to the offices of Biebrach, Bruch and Moore, Inc., insurance brokers in San Jose, California to procure automobile liability insurance. [Tr. p. 182.]

At that time Gonzales told an employee of said firm that he desired automobile insurance to enable him to obtain a California operator's license and to purchase an automobile to use as transportation to and from work. [Tr. pp. 182-188.]

The broker gave Gonzales an application for insurance under the California Assigned Risk Plan. The California Assigned Risk Plan was established to provide automobile liability insurance for those persons who are in good faith entitled thereto but are unable to procure insurance by ordinary methods. All automobile liability insurance carriers engaged in business in California are required to participate in said Plan and each carrier is assigned its pro rata share of assigned risks.

*Cal. Ins. Code,* Sec. 11160, *et seq.*

Since Gonzales was unable to read, Mrs. Gonzales completed the California Assigned Risk Application on behalf of her husband. [Tr. pp. 181, 216-218.]

Question 13 of the application asked the purposes for which the automobile was to be used. Gonzales answered, "Transportation to and from work."

Question 27 of the application asked "Are you required to file evidence of financial responsibility?" Gonzales answered, "Yes."

Question 27(a) asked what form of certificate is required by the Motor Vehicle Department. Gonzales marked the space specifying the form as "Owner and Operator."

Questions 15 and 16 asked if Gonzales had a California auto registration and operator's license. Gonzales replied that he had neither.

The application stated that the applicant must answer all questions fully. Mrs. Gonzales did not fully complete the application on behalf of her husband. A number of questions were partially or totally unanswered. Plaintiff's Exhibit 3. [Tr. p. 119.]

On or about April 15, 1952, Gonzales' application for insurance was forwarded to Appellee from the California Automobile Assigned Risk Plan. [Tr. p. 3.]

On or about April 17, 1952, Appellee in the regular course of its business received a confidential report from Metropolitan Reporting Service, a service used by insurance companies, and which had been employed at the expense of Appellee to investigate Gonzales. [Tr. pp. 332, 373, 374.]

The confidential report stated that Gonzales' automobile was not seen but at the time of inspection was stated to be in good mechanical and operational condition, that it was used for Gonzales' own personal pleasure and needs and that when it was not in use it was garaged at home. Plaintiff's Exhibit 5. [Tr. p. 120.]

### C. The Insurance Policy.

Although the application for insurance was not completed, Appellee issued an insurance policy on behalf of Gonzales.

The original policy issued by Appellee was not available at the trial. Both Gonzales and his wife stated that they delivered the original policy and other of their papers to Elmar Schmidt, an adjustor employed by Appellee. [Tr. pp. 206, 207, 271, 272.] Mr. Schmidt admitted receiving the other papers but denied obtaining the original policy.

[Tr. pp. 388-396.] None of the documents received by Mr. Schmidt from Gonzales were returned. [Tr. pp. 278, 397.]

James H. Merritt, underwriting manager of the Pacific Division of Appellee, testified that Appellee issued a non-owner automobile liability policy in accordance with the application submitted by Gonzales and that Appellee believed that Gonzales did not have an automobile at the time it issued its policy. [Tr. pp. 310-313.] Mr. Merritt testified that the policy issued by Appellee was the original of Plaintiff's Exhibits 8 and 9 and Defendant's Exhibit I. [Tr. pp. 121, 325.] See Exhibit B to Defendant's Answer to First Amended Complaint. [Tr. pp. 54-58.]

However, Appellee's quotation sheet, written prior to the issuance of the policy stated that Gonzales' automobile "Will be principally garaged in San Jose." Plaintiff's Exhibit 18. [Tr. pp. 329, 333.]

According to Mr. Merritt, the policy contained a special "non-owner endorsement" providing that Gonzales was not insured in the operation of any automobile owned by him. Mrs. Gonzales testified that the special "non-owner endorsement" was not attached to the original policy received by Gonzales. [Tr. pp. 259-260.] Mr. Merritt testified that Plaintiff's Exhibit 18 was an exact carbon copy of said special endorsement. [Tr. pp. 308, 328, 329.] The carbon copy of the special endorsement did not state the date on which it was to become effective although space was provided in which to insert the effective date.

Mr. Merritt further testified that the policy period was from May 3, 1952 to May 3, 1953 with liability limits

of $5,000.00 for each person and $10,000.00 for each accident and that Gonzales paid the premium that was charged him.

**D. Certificate of Financial Responsibility.**

Mr. Merritt testified that since Gonzales applied for insurance in order to obtain a California operator's license, it was necessary for Appellee to file a Certificate of Financial Responsibility with the California Department of Motor Vehicles before such license would be issued to Gonzales. [Tr. pp. 374-375.]

See:

*Cal. Veh. Code,* Sec. 415.

Accordingly, upon issuing the policy to Gonzales, Appellee filed a Certificate of Financial Responsibility with the Department of Motor Vehicles. [Tr. p. 4.]

The Certificate stated that Appellee's insurance policy covered "the operation of any motor vehicle *not registered* to the insured." Plaintiff's Exhibit 7. [Tr. p. 120.]

Mr. Merritt testified that Appellee customarily and usually files a Certificate of Financial Responsibility of the type requested in the application for insurance. However, although Gonzales requested a certificate as *"owner and operator,"* Appellee did not file this type of certificate on behalf of Gonzales. [Tr. pp. 335-337, 374-375.]

Mr. Merritt also testified that he knew that it was possible for Gonzales to have owned an automobile and not have the automobile registered. [Tr. pp. 369-371.]

Subsequent to the accident involving Appellant Chisato Yoshida, Keith Thomas, Claims Supervisor of Appellee, advised Appellee that the language of Appellee's Certificate of Financial Responsibility would be much more

adequate if it read *"not owned by nor registered to* the insured." [Tr. pp. 399-400.]

After said accident, the language of the Certificate of Financial Responsibility was changed to read in conformity with Mr. Thomas' suggestion. Plaintiff's Exhibit 19. [Tr. pp. 343-346, 399-400.]

### E. The 1937 Chevrolet and Registration.

On September 21, 1952, Gonzales acquired a 1937 Chevrolet, the automobile involved in the accident with Appellant Chisato Yoshida. [Tr. p. 191.]

At that time, Gonzales signed a car order with the vendor, O. K. Morton, which stated that "title of ownership" did not pass to Gonzales until the final cash payment was made. Plaintiff's Exhibit 10. [Tr. p. 121.]

Gonzales has never fully paid for the automobile and at the time of the accident with Appellant Chisato Yoshida the final cash payment had not been made. [Tr. p. 192.]

The 1952 registration on said Chevrolet expired on December 31, 1952. The 1953 registration was not obtained until after the date of the accident involving Appellant Chisato Yoshida. At the date of the accident with Appellant Chisato Yoshida, the automobile was not registered to Gonzales. Plaintiff's Exhibit 17. [Tr. pp. 5, 143, 144, 160.]

### F. Notice of Acquisition of 1937 Chevrolet.

Appellee's insurance policy provided for giving of notice of newly acquired automobiles within 30 days in order to be covered by Appellee's insurance. Gonzales did not notify Appellee of acquisition of the 1937 Chevrolet within said 30 day period. Plaintiff's Exhibit 8. [Tr. p. 121.]

However, on January 29, 1953, while driving said 1937 Chevrolet, Gonzales had an accident with one, Ephraim Lopez. [Tr. pp. 194, 195.]

On January 31, 1953, Gonzales filed an accident report with Appellee, and on or about March 23, 1953, Appellee received a letter from Olympic Insurance Company with reference to said Lopez accident. Both of said documents stated that Gonzales was the owner and operator of the automobile involved in the Lopez accident. Plaintiff's Exhibit 11. [Tr. pp. 4, 5, 122.]

**G. Estoppel and Waiver of Appellee.**

After receiving notice that Gonzales owned said 1937 Chevrolet, Appellee mailed a letter to him, which stated "Dear Policyholder: Thank you for reporting this accident which is receiving our careful attention. You may be sure that you will receive full protection according to your policy coverage," along with additional claim blanks to be used in case of further accidents. Plaintiff's Exhibit 12. [Tr. pp. 5, 17, 124, 265, 268.] Subsequently, Appellee settled the Lopez claim by paying certain monies on behalf of Gonzales. Plaintiff's Exhibit 11. [Tr. pp. 5, 122.]

During 1953, Appellee used a form of classification sheet for specifying insurance coverage of its policyholders. Such classification sheets were prepared after accidents involving Appellee's policyholders and were employed in handling claims filed against persons insured by Appellee. The classification sheet used in connection with the Lopez claim stated that Gonzales owned a 1937 Chevrolet which was garaged in California. It did not specify that a non-ownership endorsement was issued to Gonzales although space was provided to state whether a non-owner-

ship policy was involved. Plaintiff's Exhibit 11. [Tr. pp. 122, 346.]

The classification sheet used in connection with Appellant Chisato Yoshida's accident was identical to the Lopez classification sheet except that it stated that Gonzales owned a 1934 Chevrolet. Plaintiff's Exhibit 14. [Tr. pp. 125, 346, 353.]

A telegram from Appellee's San Francisco office to its Los Angeles office, dated April 24, 1953, regarding the insurance coverage afforded Gonzales referred to an automobile belonging to Gonzales "garaged at San Jose." Plaintiff's Exhibit 18. [Tr. p. 329.]

At no time after receiving notice that Gonzales owned the 1937 Chevrolet, did Appellee inform Gonzales that he was not covered by insurance while driving the 1937 Chevrolet. The first time that Gonzales was advised that there was a question of coverage was after his accident with Appellant Chisato Yoshida. [Tr. pp. 17, 199-205, 218-220.]

After the Lopez accident and until the accident with Appellant Chisato Yoshida, Gonzales continued to drive the 1937 Chevrolet. [Tr. pp. 200-201.]

Since the original insurance policy was not available to Appellants, the First Amended Complaint sets forth inconsistent facts regarding Appellee's insurance policy, in alternative causes of action and in accordance with F. R. C. P., Rule 8(e)(2).

*Automobile Insurance Company v. Barnes-Manley,* 168 F. 2d 381 (10th Cir., 1948);

*Blazer v. Black,* 196 F. 2d 139 (10th Cir., 1952).

All emphasis in this brief is added.

## ARGUMENT.

### I.

### Appellee's Insurance Policy Covered Gonzales for Liability Arising Out of the Operation of the 1937 Chevrolet Involved in the Accident With Appellant Chisato Yoshida.

#### A. The 1937 Chevrolet Was Not an Owned Vehicle Within the Meaning of Appellee's Insurance Policy.

Coverage A of Section 1 of Appellee's insurance policy provided that Appellee shall pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . caused by accident and arising out of the ownership, maintenance or use of the automobile." Plaintiff's Exhibit 8. [Tr. p. 121.]

The Trial Court found that Appellee issued on behalf of Gonzales a policy to which was attached an endorsement which provided that "the insurance does not apply (a) to any automobile owned by the named insured or a member of his household . . ." and that Gonzales "acquired the ownership" of said 1937 Chevrolet prior to the accident with Appellant Chisato Yoshida. [Tr. pp. 60, 61, 64.]

The latter finding is erroneous as a matter of law insofar as it construes Appellee's insurance policy most strongly in favor of Appellee.

On September 21, 1952, Gonzales signed a car order for purchase of the 1937 Chevrolet. The car order stated that title of ownership did not pass to Gonzales until the final cash payment was made. Plaintiff's Exhibit 10. [Tr. p. 121.] The evidence is undisputed that Gonzales has never paid for said automobile and that at the time of

the accident with Appellant Chisato Yoshida the final cash payment had not been made. [Tr. p. 192.]

Under California Civil Code, Section 1738, where a contract to sell specific goods exists, the property is transferred to the buyer at such time as the parties intend.

In the instant case, ownership remained in the vendor and Gonzales received nothing more than a conditional right to possession.

*Fageol Truck & Coach Co. v. Pacific Indemnity Co.,* 18 Cal. 2d 731, 745, 117 P. 2d 661 (1941);

*Houghan v. Rowland,* 33 Cal. App. 2d 11, 14, 90 P. 2d 860 (1939).

The word "owner" is defined in at least six different ways in the California Vehicle Code.

See:

Cal. Veh. Code, Secs. 66, 67, 176, 177, 383.5, 402, 716.

However, the term "owned" is not defined in Appellee's insurance policy.

Since parol evidence was not offered to aid construction of the policy, construction is a matter of law.

*Continental Casualty Co. v. Phoenix Construction Co.,* 46 A. C. 429, 435, ..... P. 2d ..... (1956);

*Western Coal & Mining Co. v. Jones,* 27 Cal. 2d 819, 826-827, 167 P. 2d 719 (1946).

Whether Appellee's policy used the term "owned" in the common law sense or within the context of any of the cited Vehicle Code sections is left to conjecture and the "non-owner" endorsement logically could have more than one meaning.

Where the language of an insurance policy is susceptible of two constructions, the policy should be construed most strongly in favor of the insured.

*Kershner v. United States of America,* 215 F. 2d 737 (9th Cir., 1954);

*Allstate Insurance Co. v. Erickson,* 227 F. 2d 755 (9th Cir., 1955);

*Continental Casualty Co. v. Phoenix Construction Co.,* 46 A. C. 429, ..... P. 2d ..... (1956);

*Pleasant Valley Assn. v. Cal-Farms, Inc.,* 142 A. C. A. 136, 142, ..... P. 2d ..... (1956);

*Fageol Truck & Coach Co. v. Pacific Indemnity Co.,* 18 Cal. 2d 731, 747, 117 P. 2d 661 (1941);

*Pendell v. Westland Life Ins. Co.,* 95 Cal. App. 2d 766, 769, 214 P. 2d 392 (1950).

An injured party suing on an insurance policy also is entitled to have the policy construed most strongly against the insurer.

*Sly v. American Indemnity Co.,* 127 Cal. App. 202, 15 P. 2d 522 (1932).

Moreover, where coverage is to be limited by exceptions, the insurer must phrase the exceptions in clear and unmistakable language.

*Pendell v. Westland Life Ins. Co.,* 95 Cal. App. 2d 766, 214 P. 2d 392 (1950).

In the *Pendell* case, *supra,* the court stated on page 770 as follows:

"Exceptions in a contract of insurance which purports to limit the risk assumed by the insurer in the general provisions thereof are to be construed most

> strongly against the insurer and in favor of the insured and if susceptible of two meanings, the one most favorable to the insured is to be adopted."

In *Continental Casualty Co. v. Phoenix Construction Co., supra,* the court stated as follows on page 442:

> "If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured, for the losses to which the insurance relates."

Accordingly, since the non-owner endorsement could have two or more logical interpretations, the Court should construe the policy in favor of the assured and hold, as a matter of law, that the 1937 Chevrolet was not an "owned" automobile within the meaning of Appellee's special endorsement, title having remained in the vendor. Thus, Gonzales was covered by Appellee's insurance.

**B. The Non-owner Endorsement Was Not Operative on the Date of the Accident With Appellant Chisato Yoshida.**

Assuming, *arguendo,* that the 1937 Chevrolet was an owned automobile within the meaning of Appellee's policy, the special non-owner endorsement was not operative on the date of the accident with Appellant Chisato Yoshida.

The non-owner endorsement had space provided in which to insert its "effective date." No effective date was stated in the endorsement. Plaintiff's Exhibit 18. [Tr. pp. 308, 328, 329.]

No explanation was offered at the trial as to the reasons why the non-owner endorsement did not state the date on which it was to become effective.

Accordingly, in accordance with the authorities cited above, such failure to state an effective date must be construed against Appellee. Thus, the non-owner endorsement was not operative on the date of the accident with Appellant Chisato Yoshida, and the 1937 Chevrolet was covered by Appellee's policy. The trial court's finding that non-owner policy was to be effective from May 3, 1952 [Tr. p. 60], is clearly at variance with the special endorsement.

**C. Appellee Itself Has Construed Its Insurance Policy as Affording Coverage to Gonzales in the Operation of the 1937 Chevrolet.**

At most, Appellee's policy is ambiguous with reference to the meaning of its non-owner endorsement and whether its undated endorsement was operative. Accordingly, under California law, Appellee's conduct may be examined to discover what Appellee understood the coverage to include. The construction given by Appellee should be enforced by the Court.

See cases cited in
12 Cal. Jur. 2d 341.

What did Appellee believe its coverage included? Appellee's quotation sheet, prepared prior to the issuance of the policy, referred to an automobile garaged in San Jose. Plaintiff's Exhibit 18. [Tr. pp. 329, 323.] Appellee's Certificate of Financial Responsibility stated that coverage included all automobiles not registered to Gonzales. Plaintiff's Exhibit 7. [Tr. p. 120.] Appellee received notice of Gonzales' interest in an automobile in its Confidential Report received from Metropolitan Reporting Service, Plaintiff's Exhibit 5 [Tr. p. 120], and subsequent to

the Lopez accident, from both Gonzales and the Olympic Insurance Company. Plaintiff's Exhibit 11. [Tr. pp. 4, 5, 122.]

Thereafter, Appellee advised Gonzales that he was receiving full protection according to his policy coverage, mailed Gonzales additional claim blanks to be used in case of further accidents, Plaintiff's Exhibit 12 [Tr. pp. 5, 17, 124, 265, 268], settled the Lopez claim asserted against Gonzales, Plaintiff's Exhibit 11 [Tr. pp. 5, 122], stated in its classification sheets that Gonzales owned a Chevrolet automobile and did not state that non-ownership coverage was applicable. Plaintiff's Exhibits 11 and 14. [Tr. pp. 122, 125, 346, 353.] Appellee advised its Los Angeles office that Gonzales was covered for an automobile garaged in San Jose, Plaintiff's Exhibit 18 [Tr. p. 329], and at no time prior to the accident with Appellant Chisato Yoshida advised Gonzales that there was any question of coverage. [Tr. pp. 17, 199-205, 218-220.]

Appellee's conduct unequivocally establishes that, until Appellee faced the risk of paying for the substantial injuries sustained by Appellant Chisato Yoshida, and even subsequent thereto, in the preparation of its classification sheet, Appellee acted as though Gonzales was covered in the operation of the 1937 Chevrolet. Since Appellee itself construed its policy as affording coverage to Gonzales, the Court should likewise interpret said policy.

## II.

## Appellee Is Estopped to Assert That Its Insurance Policy Did Not Cover Gonzales for Liability Arising Out of the Operation of the 1937 Chevrolet.

### A. As a Matter of Law Appellee Cannot Assert That Its Insurance Policy Was Contrary to the Application Filed by Gonzales.

The California courts have been most liberal in establishing an estoppel when it is necessary to do justice.

*Trades & General Insurance Co. v. Champ,* 225 F. 2d 802 (9th Cir., 1955);

*Truck Insurance Exchange v. Industrial Accident Commission,* 36 Cal. 2d 646, 226 P. 2d 583 (1951).

In his application for insurance, Gonzales stated that he desired an automobile to be used for transportation to and from work and that he was required to file a Certificate of Financial Responsibility with the California Department of Motor Vehicles as "owner and operator." Plaintiff's Exhibit 3. [Tr. p. 119.]

Appellee's Pacific Coast Underwriting Manager testified that Appellee regularly files a Certificate of Financial Responsibility of the type requested in the application for insurance, in which certificate Appellee states the type of insurance issued. Although Gonzales requested that a Certificate be filed which specified coverage as owner and operator, Appellee did not issue this type of insurance policy to Gonzales and Appellee did not file a Certificate of the type requested by Gonzales in his application. [Tr. pp. 335-337, 374-375.]

See:

Cal. Veh. Code, Sec. 414.

At the bottom of the application, the following was stated: "Review this application to make certain all questions are answered in full in order to eliminate delay." Plaintiff's Exhibit 3. [Tr. p. 119.]

Appellee issued a policy in favor of Gonzales without requiring the application to be completed. Thus, Appellee is bound by the application. If the application was ambiguous in any respect, such ambiguity must be resolved against Appellee, and if the language of the application could be understood in more than one sense, construction must be against Appellee and in favor of the insured.

*New York Life Insurance Co. v. Calhoun,* 92 F. 2d 406 (8th Cir., 1938);

*Bayley v. Employers Liability Assurance Corp.,* 125 Cal. 345, 58 Pac. 7 (1899);

*Faris v. American National Assurance Co.,* 44 Cal. App. 48, 54, 55, 185 Pac. 1035 (1919).

Whether or not Gonzales owned an automobile at the time the application was filed is immaterial. Appellee should have either issued a policy which would have enabled it to file a Certificate of Financial Responsibility in conformity with Gonzales' request or notified him that the application was ambiguous and incomplete. Having failed to thus notify Gonzales, Appellee is estopped to assert that its coverage was other than requested in the application.

An insured has a right to rely on the presumption that the policy he received is in accordance with his application,

and his failure to read the policy will not relieve the insurer from the duty of so writing it.

*Motor T Company v. Great American Indemnity Co.,* 6 Cal. 2d 439, 58 P. 2d 374 (1936);

*Ames v. Employers Casualty Co.,* 16 Cal. App. 2d 255, 256, 60 P. 2d 347 (1936);

*California Co. v. New Zealand Insurance Co.,* 23 Cal. App. 611, 138 Pac. 960 (1913).

Where an insuror inserts a clause in a policy contrary to the application such clause will not affect the rights of the insured or the rights of a member of the public which the insured was attempting to protect in good faith. The failure of the insured to discover such a clause inserted in the policy is not a defense to the insurer.

*American Employers Assurance Co. v. Lindquist,* 43 Fed. Supp. 610 (N. D. Cal., 1942);

*Kavanaugh v. Franklin Fire Ins. Co.,* 185 Cal. 307, 313, 197 Pac. 99 (1921);

*Raulet v. Northwestern Insurance Co.,* 157 Cal. 213, 107 Pac. 292 (1910).

In *Snyder v. Redding Motors,* 131 Cal. App. 2d 416, 280 P. 2d 811 (1955), plaintiffs applied and paid for property damage insurance. The insurance company failed to take action on the application, failed to issue a policy, failed to return the application, and failed to refund the premium. The Court of Appeals in affirming the Trial Court's holding that there was an implied acceptance of the policy, stated on pages 422 and 423 as follows:

". . . The premium had been paid by respondents and not returned to them. Being thus misled they operated their vehicle on the highways believing

that they were protected in the event that damage occurred which would be covered by the policy.

". . . When an agent accepts an application and the premium therefor the average automobile purchaser feels justified in driving his newly acquired automobile in the belief that he is insured in accordance with the terms of the application."

Accordingly, Appellee is estopped as a matter of law, to assert that its policy was contrary to Gonzales' application, and any ambiguities in the application should be resolved against Gonzales. The Court should hold that Appellee should have issued such insurance to Gonzales to have enabled it to have filed a Certificate of Financial Responsibility as "owner and operator." Under such insurance Gonzales would have been covered in the operation of said 1937 Chevrolet, and Appellee would be liable to Appellants.

**B. As a Matter of Law Appellee Is Estopped to Assert That the Coverage of Its Insurance Policy Was Other Than Set Forth in the Certificate of Financial Responsibility Filed With the California Department of Motor Vehicles.**

Condition 5 of Appellee's insurance policy provides that the policy "shall comply with the provisions of the Motor Vehicle Financial Responsibility Law of any state or province which shall be applicable . . ." Plaintiff's Exhibit 8. [Tr. p. 121.]

California Vehicle Code, Section 414, provides that an insurance carrier may give evidence of financial responsibility to the State of California by filing a written certificate that it has issued for the benefit of its insured a Motor Vehicle liability policy as defined in Vehicle Code, Section 415.

Said Vehicle Code provisions are part of the California Financial Responsibility Law and are to be read in interpreting Appellee's policy.

*Continental Casualty Co. v. Phoenix Construction Co.,* 46 A. C. 429, ..... P. 2d ..... (1956).

In the instant case, Appellee filed a Certificate of Financial Responsibility with the Department of Motor Vehicles stating that its insurance covered Gonzales in "the operation of any motor vehicle *not registered* to the insured." Plaintiff's Exhibit 7. [Tr. p. 120.]

The California Vehicle Code distinguishes between registration and ownership.

See:

Cal. Veh. Code, Secs. 151.1, 156, 159, 160, 164.

That Appellee also knew that there was a distinction between registration and ownership was admitted by Mr. Merritt [Tr. pp. 369-371] and is evidenced by the fact that subsequent to the accident with Appellant Chisato Yoshida, the language of the Certificate of Financial Responsibility was changed to read that Appellee's insurance covered the operation by the insured of any motor vehicle *"not owned by nor registered to"* the insured. Plaintiff's Exhibit 19. [Tr. pp. 343-346, 369-371, 399, 400.]

In the instant case, 1952 registration on Gonzales' Chevrolet expired on December 31, 1952. Gonzales did not obtain 1953 registration until after the date of the accident with Appellant Chisato Yoshida. Plaintiff's Exhibit 17. [Tr. pp. 5, 143, 144, 160.]

In *Rainey v. Ross,* 106 Cal. App. 2d 286, 235 P. 2d 45 (1951), the Court stated on pages 292 and 293 as follows:

> "When a person's vehicle is registered for a given year (as was respondent's in 1944) and he observes these reregistration requirements for the ensuing year (as did respondent in 1945), there is no period of time during which the vehicle is not 'registered.' The hiatus that occurs incident to the imposition and payment of the annual license fee, checking of appropriate records in the department, and the issuance of the new registration card and the new license plates or devices, is more seeming than real. . . . When, as here, timely application for annual renewal is made, it all relates back to the beginning of the year."

However, in the instant case, there was a hiatus in registration because Gonzales failed to register his automobile during the period allowed by law. Accordingly, at the time of the accident with Appellant Chisato Yoshida, the 1937 Chevrolet was not registered to Gonzales.

Appellee stated its insurance coverage in its Certificate of Financial Responsibility and the Department of Motor Vehicles issued an operator's license to Gonzales in reliance thereon. Appellee cannot now assert that its insurance coverage was other than set forth in the Certificate. Such would effectively vitiate and defeat the purposes of the California Financial Responsibility Law.

In *Continental Casualty Co. v. Phoenix Construction Co.,* 46 A. C. 429, ..... P. 2d ..... (1956), the Court stated on page 440 that the Financial Responsibility Law is:

> ". . . designed to give monetary protection to that ever changing and tragically large group of

persons who while lawfully using the highways themselves suffer grave injury through the negligent use of those highways by others. Such a law is remedial in nature and in the public interest is to be liberally construed to the end of fostering its objectives. (See Wheeler v. O'Connell (1937), 297 Mass. 549 [9 N. E. 2d 544, 111 A. L. R. 1038, 1041].) As said by Mr. Justice Heydenfeldt for this court long ago, and still the law, 'The rule of law in the construction of remedial statutes requires great liberality, and wherever the meaning is doubtful, it must be so construed as to extend the remedy.' "

Since the 1937 Chevrolet was not registered to Gonzales on the date of his accident with Appellant Chisato Yoshida, the automobile was covered within the meaning of Appellee's Certificate of Financial Responsibility, filed with the State of California under the Assigned Risk Plan. Appellee cannot claim coverage contrary to its Certificate of Financial Responsibility in reliance on which the Department of Motor Vehicles issued its operator's license to Gonzales. Thus, Appellee is liable under its policy to Appellants.

**C. As a Matter of Law, Appellee Is Estopped to Assert That Its Policy Did Not Cover Gonzales in the Operation of the 1937 Chevrolet by Virtue of Its Conduct After Receiving Notice That Gonzales Acquired Said Automobile.**

In *Allen v. Hance,* 161 Cal. 189, 118 Pac. 527 (1911), the California Supreme Court stated on page 196 as follows:

"Whatever may have worked the estoppel . . . it amounts to but this, that a man is forbidden to show the existence of a fact because by his past con-

duct, his declarations, his agreement, his deed or a judgment, it would work an injustice and an injury to his adversary to permit him to do so."

Where only one inference can be drawn from the evidence, estoppel is a question of law.

*Krobitzsch v. Middleton,* 72 Cal. App. 2d 804, 815, 165 P. 2d 729 (1946).

Prior to the accident with Appellant Chisato Yoshida, Appellee received notice by mail from Gonzales and Olympic Insurance Company that Gonzales was the owner of the 1937 Chevrolet which was subsequently involved in said accident. Plaintiff's Exhibit 11. [Tr. pp. 4, 5, 122.]

Whatever notice Appellee's agents and employees acquired while acting in the course of their employment is imputed to Appellee.

*Universal Pictures Company v. Harold Lloyd Corp.,* 162 F. 2d 354 (9th Cir., 1947).

Moreover, it was not necessary to show that Appellee had actual knowledge as to the ownership of the 1937 Chevrolet where the facts brought directly to Appellee's attention cast upon it the duty to inquire into other pertinent facts.

*Motor T Company v. Great American Indemnity Co.,* 6 Cal. 2d 439, 58 P. 2d 374 (1936).

After receiving such notice, Appellee settled the Lopez claim asserted against Gonzales for the negligent operation of said automobile, advised Gonzales that he was receiving full protection in accordance with his policy coverage, forwarded claim blanks to be used by Gonzales in case of additional accidents and failed to advise Gon-

zales that he was not covered by Appellee's insurance while driving said automobile. Plaintiff's Exhibits 11 and 12. [Tr. pp. 5, 17, 122, 124, 199-205, 218-220.]

An estoppel may arise from silence where there is a duty to speak, where the party upon whom such duty rests has an opportunity to speak, and knowing that the circumstances require him to speak, remains silent.

> *People v. Ocean Shore R.R.,* 32 Cal. 2d 406, 421, 196 P. 2d 570 (1948);
>
> *Bettelheim v. Hagstrom Food Stores,* 113 Cal. App. 2d 873, 249 P. 2d 301 (1952).

A duty to speak arises when in conscience and equity one ought to speak.

> *Altman v. McSullum,* 107 Cal. App. 2d 847, 236 P. 2d 914 (1951).

Accordingly, Appellee, by failing to advise Gonzales that there was a question of coverage is estopped to deny liability under its policy.

Moreover, in *Indiana Lumbermen's Mutual Insurance Co. v. Janes,* 230 F. 2d 500 (5th Cir., 1956), the Court held that an insurer, by paying a claim, affirmed the existence of valid coverage. There the Court stated on page 504 as follows:

> "Moreover, after all of these facts were fully known to the insurer as a consequence of the investigation of the Janes collision in March, 1953, and after notice to J. L. Forbes of cancellation of the policy in April had become effective, the insurer, by paying a substantial amount to him as the collision loss sustained by the insured vehicle, affirmed the existence of a valid contract between it and J. L. . . ."

In the ordinary case, a person who applies for insurance expects to be covered according to his application. When the insurer settles the matter with another party after an accident, and fails to advise the insured that there is no coverage, he continues to believe that he is covered. Such conduct estops Appellee to deny coverage.

*Snyder v. Redding Motors,* 131 Cal. App. 2d 416, 280 P. 2d 811 (1955).

That Gonzales believed he was covered while driving said 1937 Chevrolet and relied on Appellee's conduct in the belief that he was insured, is the only reasonable inference to be drawn from the evidence.

In *Mahoning Investment Company v. United States,* 3 Fed. Supp. 622 (Ct. Cl., 1933), the Court stated on page 630 as follows:

> "In most of the cases of estoppel by acquiescence it will be found that there is no direct proof that the party claiming the estoppel was misled, but this fact is found as a natural and ordinary inference from all of the circumstances of the case . . .
>
> "All that is shown in these cases is that the acts of the party estopped were such as to mislead the party claiming the estoppel to continue in the course already begun, believing the same to be acceptable to the party estopped."

Accordingly, Appellee is estopped to deny coverage under the policy issued to Gonzales.

**D. As a Matter of Law, Appellee Waived the Notice Provisions of Its Policy Pertaining to the Acquisition of Newly-Acquired Automobiles.**

Appellee's insurance policy provided that if the insured gave notice within thirty days of the acquisition of a new automobile, such newly-acquired automobile would be covered under its policy. Plaintiff's Exhibit 8. [Tr. p. 121.]

In the instant case, Gonzales did not give notice of acquisition of the 1937 Chevrolet within thirty days. However, notice was subsequently given. Plaintiff's Exhibit 11. [Tr. p. 122.]

After receiving such notice, Appellee mailed a letter to Gonzales, which stated "Thank you for reporting this accident which is receiving our careful attention. You may be sure that you will receive full protection according to your policy coverage," along with additional claim blanks to be used in case of further accidents. Plaintiff's Exhibit 12. [Tr. pp. 5, 17, 124, 265, 268.] Subsequently, Appellee settled the Lopez accident claim by paying certain monies on behalf of Gonzales. Plaintiff's Exhibit 11. [Tr. pp. 5, 122.]

At no time after receiving such notice did Appellee inform Gonzales that he was not covered by insurance while driving the 1937 Chevrolet. The first time that Gonzales was advised that there was a question of coverage was after his accident with Appellant Chisato Yoshida. [Tr. pp. 17, 199-205, 218-220.]

A waiver will be implied from conduct on the part of an insurer which is sufficient to justify a reasonable belief on the part of the insured that the company will not insist upon compliance with policy provisions.

*Spiegelman v. Metropolitan Life Ins. Co.,* 21 Cal. App. 2d 299, 68 P. 2d 1006 (1937);

*Francis v. Iowa National Fire Ins. Co.,* 112 Cal. App. 565, 297 Pac. 122 (1931).

Where a party to a transaction induces another to act on the reasonable belief that he has waived or will waive certain rights which he is entitled to assert, he will be estopped to insist on such rights to the prejudice of the one misled.

*Baker v. Humphrey,* 101 U. S. 494;

31 C. J. S. 344.

In *Farrar v. Policyholders Life Ins. Assn.,* 3 Cal. App. 2d 87, 39 P. 2d 229 (1934), the Court stated on page 94:

> "The weight of authority supports the proposition that an insurance company waives or is estopped to assert a violation of the terms of an insurance contract if the company, on being notified of the violation, remains silent and fails to object or to declare a forfeiture, or cancel or rescind the contract, within a reasonable time. This rule is no doubt in most cases based on the theory that it is a breach of good faith on the part of an insurance company to remain silent and inactive on notice of a breach, and to retain the unearned premiums, and so lead the insured to believe that his insurance contract is regarded as valid notwithstanding the breach."

Thus, Appellee has waived the 30-day notice provision of its policy and is estopped to deny coverage against Gonzales.

Moreover, that which operates as a waiver or estoppel in favor of an assured under an automobile liability policy also operates as a waiver or estoppel in favor of an injured person suing the insurer.

*Indemnity Insurance Co. v. Forest,* 44 F. 2d 465 (9th Cir., 1930);

*Wheeler v. Lumbermens Mutual Casualty Co.,* 5 Fed. Supp. 193 (Me., 1953);

*Olds v. General Accident Fire Etc. Corp.,* 67 Cal. App. 2d 812, 821, 824, 155 P. 2d 676 (1945);

*Walters v. West American Ins. Co.,* 4 Cal. App. 2d 581, 586, 41 P. 2d 355 (1935);

*Killeen v. General Accident Etc. Corp.,* 227 N. Y. Supp. 220.

## III.

## The Trial Court Committed Prejudicial Error in the Admission of Certain Evidence and Exclusion of Other Evidence.

### A. The Trial Court Committed Prejudicial Error in Admitting Into Evidence the Operator's License Issued to Gonzales.

Defendant's Exhibit C is the California Operator's License, dated June 15, 1952, which was issued to Gonzales by the California Department of Motor Vehicles. A notation on the reverse side of the license states that it was limited to the operation of motor vehicles which were not registered in the name of the Licensee. [Tr. pp. 299-300.]

Appellants objected to the admission into evidence of said license on the ground that said license was irrelevant and immaterial because it was issued by the Department of Motor Vehicles *after* Appellee had issued its insurance policy and the restriction was placed on the reverse

side thereof because Appellee filed a restricted Certificate of Financial Responsibility with the Department of Motor Vehicles. [Tr. p. 300.]

The Trial Court may have been misled by the restriction on the operator's license to conclude that Appellee's policy did not cover Gonzales in the operation of the 1937 Chevrolet because the Department of Motor Vehicles had issued a restricted license to Gonzales.

However, Appellee did not act because of a requirement of the Department of Motor Vehicles. Rather, the Department issued its restricted license because of Appellee's wrongful conduct in filing a restricted Certificate of Financial Responsibility. Under California Vehicle Code, Section 415.5, the Department of Motor Vehicles was required to place on Gonzales' operator's license the identical restriction imposed by Appellee in its Certificate of Financial Responsibility.

Accordingly, the operator's license was immaterial and irrelevant in proving or disproving Appellee's liability under its policy. Moreover, since the Trial Court made a finding of fact with reference to the license it would appear that such license misled the Trial Court to conclude in favor of Appellee on the issue of whether Appellee's policy was in fact restricted by the special non-owner endorsement. [Tr. pp. 63-64.] Thus, such error was prejudicial.

**B. The Trial Court Committed Prejudicial Error in Admitting Evidence of Premium Charges for Unrestricted Insurance Policies.**

Mr. Merritt testified that the premium charged and paid by Gonzales for Appellee's insurance was $24.51. Mr. Merritt further testified, over objection of Appellants

on the grounds of irrelevancy and immaterially, that at that time the premium for a policy extending coverage to an automobile owned by an insured would have been approximately $110.00. [Tr. pp. 316-317, 331, 382, 383.]

The Trial Court found that Gonzales paid Appellee $24.51 as premium for his policy and that the premium that would have been charged for a comparable policy covering owned automobiles would have been $110.00. [Tr. pp. 62-63.]

Such finding establishes that the Trial Court was misled by said evidence to conclude that a "non-owner" restricted policy had in fact been issued and to reject the testimony of Mrs. Gonzales that no non-owner endorsement was attached to the policy mailed to Gonzales. [Tr. pp. 259-260.]

Under California Law the fact that the premium charged by Appellee was lower than customarily charged for a policy covering owned automobiles is immaterial.

*Motor T Company v. Great American Indemnity Co.,* 6 Cal. 2d 439, 448, 58 P. 2d 374 (1936).

In the *Motor T Company* case, *supra,* the Court stated on page 448 as follows:

> "In the instant case, specific coverage was requested for a particular car; the Colburn transaction involving that car was called to the attention of the agent who negotiated for the insurance as the representative of the company; and in the policy itself the name of Paul Colburn appeared. Under these circumstances the company must be held bound to give the protection thus contracted for, and it cannot be permitted to perpetrate what would undoubtedly be a fraud on the insured by relying upon the exclusion clause of the policy. The fact that the premium differs in a non-ownership policy is utterly imma-

terial. Plaintiff paid the premium charged for the coverage requested, and if by some mistake it was not charged the proper premium, it is no doubt possible to recover the deficiency."

Accordingly, in view of the Trial Court's findings, admission of evidence of higher premium charges was prejudicial error.

**C. The Trial Court Committed Prejudicial Error in Admitting Mr. Merritt's Testimony on the Issue of Waiver.**

Appellee asked Mr. Merritt to state whether it was the intention of Appellee to waive any policy provisions when payment was made on the Lopez accident claim. [Tr. p. 366.]

Objection was made on the ground that the secret, undisclosed intention of Appellee was irrelevant and immaterial to establish whether the insured relied upon Appellee's conduct and that there was no foundation to show that Mr. Merritt knew the intention of Appellee's employee who actually made or ordered payment of said Lopez claim. [Tr. pp. 366-367.]

The Trial Court overruled Appellants' objections and subsequently found that the Lopez claim was paid by mistake and that Appellee by payment of said claim did not waive nor intend to waive any policy provision in its favor. [Tr. pp. 65-66.]

In *Jones v. Maria,* 48 Cal. App. 171, 191 Pac. 943 (1920), the Court stated on page 173 as follows:

> "Waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right—an election by one to forego some advantage he could have taken or insisted upon. A person who is in a position to

assert a right or insist upon an advantage may, by his words or conduct, and without reference to any act or conduct of the other party affected thereby, waive such right. Once such right is waived, it is gone forever; the person who has waived the right will thereafter be precluded from asserting it."

The general rule is stated in 92 C. J. S. 1061 and 67 C. J. 304 that the intention essential to establish waiver is not the secret intention of a party. Intention is manifested by conduct or words in relation to the matter involved and the secret, undisclosed intent of a party is immaterial on the issue of waiver.

Even if such secret, undisclosed intention was material, Mr. Merritt rendered a mere conclusion as to the intention of the person settling the Lopez claim. There was no foundation that Mr. Merritt was familiar with anything that transpired in connection with the Lopez claim. Yet the Trial Court admitted the bald conclusions of Mr. Merritt and found in accordance therewith.

That such error was prejudicial is established by the fact that Mr. Merritt's testimony was the only evidence supporting the finding of the Trial Court that Appellee did not intend to waive the policy provisions in its favor by virtue of its conduct in the Lopez matter.

**D. The Trial Court Committed Prejudicial Error in Excluding Evidence of Gonzales' Belief That He Was Covered by Appellee's Insurance and in Excluding Conversations Between Gonzales and Mrs. Gonzales.**

The Trial Court sustained Appellee's objections to questions directed at Gonzales to establish whether he believed that Appellee's insurance protected him after Gonzales received correspondence from Appellee subsequent to the Lopez accident. [Tr. pp. 201-202, 245-246.]

Such questions were intended to establish Gonzales' reliance on Appellee's conduct as a basis of establishing estoppel. As such they were admissible.

See:

31 C. J. S. 267 (reliance as an element of estoppel).

Moreover, as a basis for establishing Appellee's estoppel, questions were asked of Mrs. Gonzales to establish whether she told Gonzales the contents of correspondence received from Appellee subsequent to the Lopez accident. Objections were sustained by the Trial Court on the ground that the questions called for hearsay. [Tr. pp. 264, 265, 269-270.]

The questions were asked because Gonzales cannot read [Tr. p. 181] and to further establish Gonzales' knowledge of the contents of said correspondence as a basis of proving his reliance on Appellee's conduct. As such the questions did not call for hearsay.

*Werner v. State Bar,* 24 Cal. 2d 611, 150 P. 2d 892 (1944);

19 Cal. Jur. 2d 109.

In the *Werner v. State Bar* case, *supra,* the Court stated on page 621 as follows:

> "The hearsay rule, however, does not forbid the introduction of evidence that a statement has been made when the making of the statement is significant, irrespective of the truth or falsity of its content."

Accordingly, the exclusion of such evidence was harmful error because it may have misled the Trial Court to conclude that Appellants had failed to prove reliance as an element of estoppel.

## IV.

## The Trial Court Failed to Make Findings on All Material Issues Raised by the Pleadings.

It is elementary that failure to find on all material issues raised by the pleadings is a ground for reversal.

*Kaiser v. Mansfield,* 141 A. C. A. 485, 490, ..... P. 2d ..... (1956);

*Parker v. Shell Oil Co.,* 29 Cal. 2d 503, 512, 175 P. 2d 838 (1946).

Appellants' First Amended Complaint alleges in alternative causes of action that Appellee was estopped to deny coverage in this case by virtue of (1) the application filed by Gonzales, (2) its payment of the Lopez claim, and (3) its conduct subsequent to payment of the Lopez claim. The Trial Court made no findings with reference to the estoppel alleged in the pleadings.

The allegations of estoppel were the essence of Appellants' case. Was Appellee estopped to deny that its insurance policy was other than the type covering Gonzales as "owner and operator" as requested in the application? Was Appellee estopped to deny coverage by virtue of its settling of the Lopez accident claim? Was Appellee estopped to deny coverage by virtue of its conduct after the Lopez accident? The findings are silent on these vital issues.

The Trial Court did find generally that all allegations of the First Amended Complaint, not otherwise found to be true, were untrue and concluded that any other findings would be immaterial. [Tr. p. 70.]

However, such general findings are not sufficient under the Federal Rules of Civil Procedure. Federal Rules of Civil Procedure, Rule 52(a), requires the Trial Court to

find the facts specially. There were no special findings on the issue of estoppel.

The only mention of estoppel is set forth in the Conclusions of Law wherein the Trial Court concludes generally and as a matter of law that Appellee was not estopped to deny liability or coverage under the provisions of its insurance policy. [Tr. p. 71.]

However, unless only one inference can be drawn from the evidence, estoppel is a question of fact.

> *Krobitzsch v. Middleton,* 72 Cal. App. 2d 804, 815, 165 P. 2d 729 (1946).

Surely, it cannot be seriously urged that the issue of estoppel was so overwhelmingly in favor of Appellee that only one conclusion was justified as a matter of law. The failure to make such findings of fact justifies reversal.

## Conclusion.

Appellee issued an insurance policy to Gonzales and Gonzales paid the premium demanded by Appellee. Until Appellee faced substantial liability by virtue of the severe and lasting injuries inflicted by Gonzales upon Appellant Chisato Yoshida, Appellee was content to allow Gonzales to believe that he was protected by Appellee's insurance. However, when the risk of paying a large sum of money under its policy became apparent, Appellee callously and without regard for any obligation under the California Financial Responsibility Law, denied coverage.

At a time when potential liability was minor, Appellee acknowledged its policy. At a time when potential liability was great, Appellee disavowed its policy. Appellee in good conscience should not be able to blame such con-

duct upon mistake; and if mistake was the cause, Appellee should pay the price of its errors. The California Financial Responsibility Laws were designed to protect innocent persons similarly situated to Appellants. Justice in this case demands that Appellee accept its obligations under such Laws. The judgment should be reversed and judgment should be entered in favor of Appellants.

Respectfully submitted,

ARTHUR N. GREENBERG,

*Attorney for Appellants.*